

The Poultry Integrator Defendants appear to have three principal objections to the State's proposed confidentiality order. The first of these objections centers on what materials are entitled to protection under a confidentiality order. The second centers on who bears the burden of proving the claims of confidentiality. And the third centers on the certification process for claims of confidentiality. As demonstrated below, each of the Poultry Integrator Defendants' objections is inconsistent with the law and policy governing claims of confidentiality, and therefore each of the Poultry Integrator Defendants' objections should be rejected. The State's proposed confidentiality order should be adopted in its entirety and without modification.²

A. The State's proposed confidentiality order properly defines the scope of materials subject to claims of confidentiality with reference to the principles of Fed. R. Civ. P. 26(c)

Under the State's proposed confidentiality order, protection would be afforded to materials containing information legitimately entitled to protection under Fed. R. Civ. P. 26(c)(7) -- that is, information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. *See* Motion, Exh. A, ¶ 3. In contrast, the Poultry Integrator Defendants seek an expansive and improper two-tiered approach toward confidentiality protection. In the first tier, not unlike the State's proposal, the Poultry Integrator Defendants would provide confidential protection to materials containing trade secrets, or confidential research, development, or commercial information. *See* Poultry Integrator Defendants' Response, Exh. 1, ¶ 3 ("designation may be used only for documents or other items which, if disclosed to a competitor, may cause material injury to the disclosing

² As noted in the State's Motion, the State's proposed confidentiality order is nearly verbatim from the standard confidentiality order approved for use by the United States District Court for the District of South Carolina.

party").³ In the second tier, however, the Poultry Integrator Defendants propose an expansive, undefined and standardless category of confidentiality protection. *See* Poultry Integrator Defendants' Response, Exh. 1, ¶ 3 (providing protection to "material which should properly be considered confidential in nature").⁴ This expansive, undefined and standardless category of "confidentiality" is entirely inconsistent with the law. *See, e.g., Hutchinson v. Pfeil*, 1999 WL 1015557, *6 (10th Cir. Nov. 9, 1999) ("To resist discovery under Rule 26(c)(7), a person must first establish that the information sought constitutes confidential research, development, or commercial information and then demonstrate that its disclosure might be harmful") (*citing Centurion Industries, Inc. v. Warren Steurer & Associates*, 665 F.2d 323, 325 (10th Cir. 1981); *Green Construction Co. v. Kansas Power & Light Co.*, 1990 WL 120925, *1 (D. Kan. July 9, 1990) ("A motion for protective order is a disfavored motion and the burden is on the moving party to show its necessity").

The need for a narrowly drawn definition of confidentiality is particularly important in litigation, such as this one, which involves the public health and safety and other issues important to the public. *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-88 (3rd Cir. 1994) ("Circumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety. . . . Similarly, the district court should consider whether the case involves issues important to the public"). Further, the Poultry

³ The State's definition is plainly preferable to the Poultry Integrator Defendants' definition in that the State's definition is based on the actual language of Fed. R. Civ. P. 26(c)(7).

⁴ This thoroughly imprecise formulation raises the obvious question of who decides whether the material "should properly be considered confidential in nature." Notably, the Poultry Integrator Defendants point to a form confidentiality order used in the United States District Court for the Northern District of California in support of their contention that a two-tiered confidentiality approach be used. *See* Poultry Integrator Defendants' Response, p. 4 fn. 2. However, a review of that order actually reveals that its definition of confidentiality, like the State's proposal, is moored in the language of Fed. R. Civ. P. 26(c). Specifically, its definition of "Confidential Information or Items" is "information (regardless of how generated, stored or maintained) or tangible things that qualify for protection under standards developed under F.R. Civ. P. 26(c)." Form N.D. Cal. Order, ¶ 2.3.

Integrator Defendants' expansive, undefined and standardless approach to confidentiality would likely result in over-designations of "confidentiality," and the State's case would quickly be enveloped in an unjustified shroud of secrecy. This, too, is inconsistent with the law. "As a general proposition, pretrial discovery must take place in the [sic] public unless compelling reasons exist for denying the public access to the proceedings." *Jepson, Inc. v. Makita Electric Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) ("sic" in original), *citing American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.1978), *cert. denied*, 440 U.S. 971, 99 S. Ct. 1533, 59 L.Ed.2d 787 (1979).

Simply put, no reason, let alone any "compelling reason," exists for the Poultry Integrator Defendants' expansive, undefined and standardless approach toward confidentiality of materials produced in this case and, indeed, none has been offered. The Poultry Integrator Defendants' proposal is inconsistent with the law and should be rejected. *See* LCvR 79.1(a) ("It is the policy of this Court that sealed documents, confidentiality agreements, and protective orders are disfavored. Sealed documents and confidentiality agreements may be approved by the Court only upon a showing that a legally protected interest of a party, non-party or witness outweighs the compelling public interest in disclosure of records. All protective orders dealing with confidentiality must be approved by a magistrate judge and filed of record") (emphasis added). The State's proposal, on the other hand, is entirely consistent with the well-established law on confidentiality orders and should be adopted without modification.

B. The State's proposed confidentiality order properly puts the burden on the party claiming confidentiality to prove the claim of confidentiality

The Poultry Integrator Defendants' second objection to the State's proposed confidentiality order concerns whether the party claiming confidentiality at all times bears the burden of proving the claim of confidentiality. The State's proposed confidentiality order states

that "[t]he burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality." Motion, Exh. A, ¶ 8(a). The Poultry Integrator Defendants' proposed confidentiality order, on the other hand, states that "[t]he burden of proving that a designation [of confidentiality] is unwarranted resides with the party challenging confidentiality." Poultry Integrator Defendants' Response, Exh. 1, ¶ 8(a).⁵ The Poultry Integrator Defendants' proposal finds no support in the law.⁶ See LCvR 79.1(a); *American Benefit Life Insurance Company v. Ille*, 87 F.R.D. 540, 543 (W.D. Okla. 1978) ("Rule 26(c) requires that 'good cause' be shown for a protective order to be issued. The burden is therefore upon the movant to show the necessity of its issuance") (emphasis added); *Gillard v. Boulder Valley School District RE-2*, 196 F.R.D. 382, 386 (D. Colo. 2000) ("the burden of proving confidentiality never shifts from the party asserting that claim") (emphasis added) (citation omitted).⁷

C. The certification provision in the State's proposed confidentiality order is not unduly burdensome and is warranted

The Poultry Integrator Defendants' third objection to the State's proposed confidentiality order concerns whether counsel for parties asserting claims of confidentiality should be required to certify, subject to the standards of Rule 11, that they have reviewed the materials and, in good

⁵ Contrary to Poultry Integrator Defendant Cargill's suggestion, the State's proposed confidentiality order provides adequate protection of the contents of materials for which challenges to confidentiality claims are being asserted. See Motion, Exh. A, ¶¶ 6 & 8(c).

⁶ Not surprisingly, the Poultry Integrator Defendants' Response cites no law for this novel proposition.

⁷ Poultry Integrator Defendant Cargill, in its Supplemental Response, comes at this issue from a slightly different (and also erroneous) direction, arguing that a party seeking to challenge a confidentiality designation should be required to state why further dissemination of the materials in question is necessary. Cargill Response, pp. 2-3. This argument misses the point entirely since the proper inquiry is whether the materials in question are legally entitled to confidential treatment under Rule 26(c) in the first place, not whether non-confidential materials are to be disseminated. See, e.g., *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1985). Indeed, Poultry Integrator Defendant Cargill's argument is revealing in that it indicates that its principal concern is not about guarding trade secrets, but rather about keeping the entirety of the litigation out of the public eye.

faith, determined that the materials contain information legitimately protected from disclosure as being sensitive personal information, trade secrets, or confidential research, development, or commercial information. The State is at a loss to understand the Poultry Integrator Defendants' objection to this provision inasmuch as the Poultry Integrator Defendants apparently agree that before materials may be designated as "Confidential -- Attorneys Eyes Only"⁸ an attorney must first have reviewed the materials and have made a good faith determination that they are entitled to protection. *See* Poultry Integrator Defendants' Response, p. 3. Doing a certification of the fact that one has indeed done such a review and made such a determination would require very little additional effort and would add a heightened degree of integrity to the entire process. *See, e.g., United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981) ("The State is certainly within its rights to demand that Hooker make the requisite showing if it believes the confidentiality claim would be used haphazardly like a 'rubber stamp'"). Indeed, the undefined breadth and scope of what the Poultry Integrator Defendants propose be protected as "confidential," coupled with the Poultry Integrator Defendants' entirely unfounded effort to shift the burden regarding the propriety of the confidentiality claim to the party challenging the confidentiality claim, could be taken as an indication that there is a potential for over-designation of confidentiality claims in this litigation.⁹ Accordingly, the requirement of a certification is warranted.

As noted above, confidentiality orders are disfavored. Accordingly, they should be narrowly tailored to protect only legitimately confidential information rather than be so expansive that they swallow up all of the materials produced in the litigation. Further, the

⁸ This is the Poultry Integrator Defendants' term roughly paralleling the State's term "Confidential."

⁹ Experience shows that confidentiality designations greatly complicate document management issues. Legally unjustified confidentiality designations should thus be guarded against strongly, and headed off at the earliest possible juncture.

burden of proving the claim of confidentiality at all times rests with the party asserting the claim of confidentiality. And finally, requiring attorney certifications as to the propriety of the confidentiality claims is not at all unduly burdensome. In fact, it acts as an additional protection against over-designations of confidentiality, thereby reducing the number of challenges to confidentiality that will require this Court's attention and enhancing judicial efficiency. In sum, the State's proposed confidentiality is consistent with all of these principles, while the Poultry Integrator Defendants' proposal is in contradiction to all of these principles.

WHEREFORE, premises considered, the State's proposed confidentiality order should be entered without modification.

Respectfully submitted,

W.A. Drew Edmondson (OBA #2628)
Attorney General
Kelly H. Burch (OBA #17067)
J. Trevor Hammons (OBA #20234)
Assistant Attorneys General
State of Oklahoma
2300 North Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105
(405) 521-3921

s/ M. David Riggs

M. David Riggs (OBA #7583)
Joseph P. Lennart (OBA #5371)
Richard T. Garren (OBA #3253)
Douglas A. Wilson (OBA #13128)
Sharon K. Weaver (OBA #19010)
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Attorneys for the State of Oklahoma

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CERTIFICATE OF MAILING

I hereby certify that on this first day of June, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

- **Jo Nan Allen**
jonanallen@yahoo.com bacaviola@yahoo.com
- **Frederick C Baker**
fbaker@motleyrice.com mcarr@motleyrice.com;fhmorgan@motleyrice.com
- **Tim Keith Baker**
tbakerlaw@sbcglobal.net
- **Douglas L Boyd**
dboyd31244@aol.com
- **Vicki Bronson**
vbronson@cwlaw.com lphillips@cwlaw.com
- **Paula M Buchwald**
pbuchwald@ryanwhaley.com loelke@ryanwhaley.com
- **Louis Werner Bullock**
LBULLOCK@MKBLAW.NET
NHODGE@MKBLAW.NET;BDEJONG@MKBLAW.NET
- **Bobby Jay Coffman**
bcoffman@loganlowry.com
- **Lloyd E Cole, Jr**
colelaw@alltel.net gloriaeubanks@alltel.net;amy_colelaw@alltel.net
- **Angela Diane Cotner**
AngelaCotnerEsq@yahoo.com
- **Reuben Davis**
rdavis@boonesmith.com
- **John Brian DesBarres**
mrjbdb@msn.com JohnD@wcalaw.com
- **W A Drew Edmondson**
fc_docket@oag.state.ok.us
drew_edmondson@oag.state.ok.us;suzy_thrash@oag.state.ok.us.
- **Delmar R Ehrich**
dehrich@faegre.com kcarney@faegre.com;;qsperrazza@faegre.com
- **John R Elrod**
jelrod@cwlaw.com vmorgan@cwlaw.com
- **William Bernard Federman**
wfederman@aol.com law@federmanlaw.com;ngb@federmanlaw.com
- **Bruce Wayne Freeman**
bfreeman@cwlaw.com lclark@cwlaw.com

- **Ronnie Jack Freeman**
jfreeman@grahamfreeman.com
- **Richard T Garren**
rgarren@riggsabney.com dellis@riggsabney.com
- **Dorothy Sharon Gentry**
sgentry@riggsabney.com jzielinski@riggsabney.com
- **Robert W George**
robert.george@kutakrock.com donna.sinclair@kutakrock.com
- **Tony Michael Graham**
tgraham@grahamfreeman.com
- **James Martin Graves**
jgraves@bassettlawfirm.com
- **Michael D Graves**
mgraves@hallestill.com jspring@hallestill.com;smurphy@hallestill.com
- **Thomas James Grever**
tgrever@lathropgage.com
- **Jennifer Stockton Griffin**
jgriffin@lathropgage.com
- **Carrie Griffith**
griffithlawoffice@yahoo.com
- **John Trevor Hammons**
thammons@oag.state.ok.us
Trevor_Hammons@oag.state.ok.us;Jean_Burnett@oag.state.ok.us
- **Michael Todd Hembree**
hembreeawl@aol.com traesmom_mdl@yahoo.com
- **Theresa Noble Hill**
thillcourts@rhodesokla.com mnave@rhodesokla.com
- **Philip D Hixon**
Phixon@jpm-law.com
- **Mark D Hopson**
mhopsom@sidley.com dwetmore@sidley.com;joraker@sidley.com
- **Kelly S Hunter Burch**
fc.docket@oag.state.ok.us kelly_burch@oag.state.ok.us;jean_burnett@oag.state.ok.us
- **Stephen L Jantzen**
sjantzen@ryanwhaley.com mantene@ryanwhaley.com;loelke@ryanwhaley.com
- **Mackenzie Lea Hamilton Jessie**
maci.tbakerlaw@sbcglobal.net tbakerlaw@sbcglobal.net;macijessie@yahoo.com
- **Bruce Jones**
bjones@faegre.com jintermill@faegre.com;bnallick@faegre.com
- **Jay Thomas Jorgensen**
jjorgensen@sidley.com noman@sidley.com
- **Krisann C. Kleibacker Lee**
kklee@faegre.com mlokken@faegre.com
- **Raymond Thomas Lay**
rtl@kiralaw.com dianna@kiralaw.com;niccilay@cox.net

- **Nicole Marie Longwell**
Nlongwell@jpm-law.com ahubler@jpm-law.com
- **Dara D Mann**
dmann@faegre.com kolmscheid@faegre.com
- **Teresa Brown Marks**
teresa.marks@arkansasag.gov dennis.hansen@arkansasag.gov
- **Linda C Martin**
lmartin@dsda.com mschooling@dsda.com
- **Archer Scott McDaniel**
Smcdaniel@jpm-law.com jwaller@jpm-law.com
- **Robert Park Medearis, Jr**
medearislawfirm@sbcglobal.net
- **James Randall Miller**
rmiller@mkblaw.net smilata@mkblaw.net;clagrone@mkblaw.net
- **Charles Livingston Moulton**
Charles.Moulton@arkansasag.gov Kendra.Jones@arkansasag.gov
- **Robert Allen Nance**
rnance@riggsabney.com jzielinski@riggsabney.com
- **William H Narwold**
bnarwold@motleyrice.com
- **John Stephen Neas**
steve_neas@yahoo.com
- **George W Owens**
gwo@owenslawfirmmpc.com ka@owenslawfirmmpc.com
- **David Phillip Page**
dpage@mkblaw.net smilata@mkblaw.net
- **K Clark Phipps**
ECF@ahn-law.com cphipps@ahn-law.com
- **Marcus N Ratcliff**
mratcliff@lswsl.com sshanks@lswsl.com
- **Robert Paul Redemann**
rredemann@pmrlaw.net scouch@pmrlaw.net
- **Melvin David Riggs**
driggs@riggsabney.com pmurta@riggsabney.com
- **Randall Eugene Rose**
rer@owenslawfirmmpc.com ka@owenslawfirmmpc.com
- **Patrick Michael Ryan**
pryan@ryanwhaley.com jmickle@ryanwhaley.com;kshocks@ryanwhaley.com
- **Laura E Samuelson**
lsamuelson@lswsl.com lsamuelson@gmail.com
- **Robert E Sanders**
rsanders@youngwilliams.com
- **David Charles Senger**
dsenger@pmrlaw.net scouch@pmrlaw.net
- **Jennifer Faith Sherrill**
jfs@federmanlaw.com law@federmanlaw.com;ngb@federmanlaw.com

- **William Francis Smith**
bsmith@grahamfreeman.com
- **Monte W Strout**
strout@xtremeinet.net
- **Colin Hampton Tucker**
chtucker@rhodesokla.com scottom@rhodesokla.com
- **John H Tucker**
jtuckercourts@rhodesokla.com mbryce@rhodesokla.com
- **R Pope Van Cleef, Jr**
popevan@robertsonwilliams.com
kirby@robertsonwilliams.com;kmo@robertsonwilliams.com
- **Kenneth Edward Wagner**
kwagner@lswsl.com sshanks@lswsl.com
- **David Alden Walls**
wallsd@wwhwlaw.com lloyda@wwhwlaw.com
- **Elizabeth C Ward**
lward@motleyrice.com
- **Sharon K Weaver**
sweaver@riggsabney.com lpearson@riggsabney.com
- **Timothy K Webster**
twebster@sidley.com jwedeking@sidley.com;ahorner@sidley.com
- **Gary V Weeks**
- **Terry Wayen West**
terry@thewestlawfirm.com
- **Dale Kenyon Williams, Jr**
kwilliams@hallestill.com jspring@hallestill.com;smurphy@hallestill.com
- **Edwin Stephen Williams**
steve.williams@youngwilliams.com
- **Douglas Allen Wilson**
Doug_Wilson@riggsabney.com pmurta@riggsabney.com
- **J Ron Wright**
ron@wsfw-ok.com susan@wsfw-ok.com
- **Lawrence W Zeringue**
lzingue@pmrlaw.net scouch@pmrlaw.net

I further certify that on this first day of June, 2006, a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage prepaid, on the following who are not registered participants of the ECF System:

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Gordon W. Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Susann Clinton
23605 S GOODNIGHT LN
WELLING, OK 74471

Eugene Dill
P O BOX 46
COOKSON, OK 74424

Marjorie Garman
5116 Highway 10
Tahlequah, OK 74464

James C Geiger
address unknown

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

G Craig Heffington
20144 W SIXSHOOTER RD
COOKSON, OK 74427

Cherrie House
P O BOX 1097
STILWELL, OK 74960

William House
P O BOX 1097
STILWELL, OK 74960

John E. and Virginia W. Adair Family Trust
RT 2 BOX 1160
STILWELL, OK 74960

Dorothy Gene Lamb
Route 1, Box 253
Gore, OK 74435

James Lamb

Route 1, Box 253
Gore, OK 74435

Doris Mares

P O BOX 46
COOKSON, OK 74424

Donna S Parker

34996 S 502 RD
PARK HILL, OK 74451

Richard E Parker

34996 S 502 RD
PARK HILL, OK 74451

C Miles Tolbert

Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Robin L. Wofford

Rt 2, Box 370
Watts, OK 74964

s/ M. David Riggs